



days after the filing of this motion for extension of time to appeal. This is unfair to Tomax's undersigned counsel as this possibility can be avoided by extending Tomax's time to appeal.

Under 28 U.S.C. §2107 and Federal Rule of Appellate Procedure No. 4, a district court can extend the time for appeal if there is "good cause" for the extension. In this case, "good cause" exists because Defendant seeks attorneys' fees against Plaintiff Tomax's counsel, i.e. an event beyond Plaintiff Tomax's control. As the court held in *Tuesno v. Jackson*, "the good cause standard" applies "in situations in which there is no fault – excusable or otherwise." An extension of time is necessary because of something that was entirely beyond the control of the moving party, such as where "the Postal Service fails to deliver a notice of appeal." *Tuesno v. Jackson*, No. 5:08-cv302(DCB)(JMR), 2013 WL 685928, at \*4 (S.D. Miss. Feb. 25, 2013). See also *Allied Steel v. City of Abilene*, 909 F.2d 139, 142 n.2, & 143 n.3 (5<sup>th</sup> Cir. 1990), overruled on other grounds by *United States v. Clark*, 51 F.3d 42 (5<sup>th</sup> Cir 1990).

In *Hamer v. Neighborhood Housing Services of Chicago*, 138 S.Ct. 13, 18 (2017), the U.S. Supreme Court held that a "two-month" extension of time to appeal is within the trial courts authority reasoning that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction. ... It is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction. Accordingly, a provision governing the time to appeal in a civil case qualifies as jurisdictional only if Congress sets the time limit." (cleaned up, citations omitted). Therefore, according to *Hamer*, the 30-day limitation recited by FRAP 4 was not "jurisdictional" and the "two-month extension" did not deprive the appeals court of jurisdiction. *Id.* at 22.

To allow a resolution of Defendant's Section 285 Motion for Attorneys' Fees, Plaintiff Tomax requests a two-month extension up to and including July 12, 2023 in which to appeal.

/s/Malcolm E. Whittaker  
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**ATTORNEY FOR PLAINTIFF TOMAX AS**

**CERTIFICATE OF CONFERENCE**

I hereby certify that I conferred with Defendant's counsel, Michael Locklar on May 8, 2023, and Defendant's counsel confirmed that Defendant is **OPPOSED** to the relief requested herein.

/s/Malcolm E. Whittaker  
Malcolm E. Whittaker

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a true and correct copy of the above document upon opposing counsel by ECF/CM on this 10th day of May, 2023.

/s/Malcolm E. Whittaker  
Malcolm E. Whittaker